

In the United Kingdom a change was made to the legislation on which Hong Kong's estate duty legislation is based.⁵⁹ The change provided for a shift of the charge from the gifted property to the purchase money. The effect of the change is that the estate duty charge does not affect title to immovable property. This change is long overdue in Hong Kong. As matters now stand, even when the Land Titles Bill is introduced, the title investigator might be obliged to conduct a historic search of all transactions affecting property⁶⁰ and when a deed of gift appears on the title cumbersome enquiries must be made. In many situations, a title investigator will be uncertain whether a client is protected under the proviso to s 18(1) of the Estate Duty Ordinance. This means either that no one will deal with property which has been the subject of a gift, or that a vendor purchaser action⁶¹ will be started to determine what evidence must be produced to show that property is not subject to an estate duty charge. It is furthermore likely that no one will deal with property subject to a latent charge to estate duty. The Bill might have other deficiencies, but the estate duty charge alone defeats its purposes.

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Tort/Contract Concurrency: The Demise of *Tai Hing Cotton Mill Ltd*

Introduction

The issue of concurrent liability in contract and tort has preoccupied the courts for some time, and the judicial pendulum has swung back and forth on not a few occasions. It is an issue that in some respects speaks to the very essence of the common law, with its tendency toward elegance¹ and the allocating of subject matter to mutually exclusive legal categories.

The issue under consideration is whether or not a plaintiff who has a contract with the defendant and who can also establish a tort relationship with

⁵⁹ s 38, Finance Act 1957.

⁶⁰ The estate duty charge potentially affects property in a number of situations. See note 5 above. When the Land Titles Bill becomes law, unless the current entries in the register reveal appropriate information about the possibility of an estate duty charge, arguably it will in all cases be necessary to conduct a search of historic entries in the Register and to investigate title to see whether any owner has died or whether property has been the subject of a gift. There is furthermore no limitation on the period over which such an investigation must be undertaken.

⁶¹ Under s 12 CPO.

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¹ A term used by Lord Goff in *Henderson v Merrett*, cited in note 31 below.

the defendant should in any way be restricted in the choice of remedy.² Such a plaintiff may wish to freely pursue a choice of remedies in order to gain some procedural advantage. If a plaintiff is to be restricted, on what basis is this to be done, and is there any justification for imposing restrictions?

The judicial response to a plaintiff seeking a choice of remedies has been inconsistent, and has failed to provide a governing principle according to which the parties to the litigation can be guided. In particular, despite the best intentions of Lord Scarman in the Hong Kong case of *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank*,³ in which he expressed his preference for the primacy of contract, the precise legal position in Hong Kong has remained unsettled.⁴

Concurrency has been the subject of judicial consideration in certain recent decisions of the House of Lords. It will here be demonstrated that the judicial pendulum has now swung decidedly and irrevocably in favour of concurrent liability, a fact that Hong Kong litigants must now take into account in planning litigation strategy and, equally importantly, in arranging their commercial activities and placing their insurance cover.

Before undertaking an analysis of these recent decisions, the implications of a concurrency rule in Hong Kong will be sketched.

Why concurrency matters

The right of a contracting party to pursue the action in tort in addition to or as an alternative to an action in contract will be of most benefit in the matter of limitation periods. This is so for two reasons. Although the limitation period begins to run in contract and in tort with the accrual of the cause of action, accrual, a common law concept, is defined differently for contract and tort. In contract, the cause of action accrues on breach⁵ while in tort, the cause of action accrues when the tort is complete,⁶ which for most torts requires the occurrence of damage. This may happen when the breach of duty occurs, if damage coincides with breach, or may be some time thereafter, as where the

² In this paper I am concerned with the problematic situation of overlapping duties, that is, where the plaintiff suing in tort and contract is asserting either that the content of the duty is the same in each, or that the contract duty is greater than that imposed by tort, or, exceptionally, that the tort duty is greater than that imposed by contract. What I am not concerned with is the non-controversial situation where the duties are clearly different, and possibly unrelated, as where a patient is injured in the doctor's waiting room as a result of defective premises. In such a case, although the parties are incidentally in a contractual relationship for the provision of medical services, there has never been any serious doubt that an action in tort is available.

³ [1986] AC 80.

⁴ In *Yu Man v T L Ip & Co* (1984) DCA No 459 of 1984, heard just a few years before *Tai Hing*, solicitors were held to owe to a client concurrent duties in contract and tort. In *Wong Chi-shing v Argos Engineering* (1993) HCA No 1869 of 1989, heard a few years after *Tai Hing*, an injured worker's claim against the employer was successfully argued in tort and contract without reference to any theoretical controversy.

⁵ *Bagot Stevens Scanlon & Co Ltd* [1966] 1 QB 197, 203.

⁶ *Cartledge v Jopling & Sons Ltd* [1963] AC 758, 777.

occurrence of damage is postponed.⁷ So for instance, in the case of negligent professional advice, the cause of action in contract would accrue at the time of the giving of the negligent advice, while the cause of action in tort would not accrue until the plaintiff has relied on the advice to his detriment.

Second, certain of the provisions in the Limitation Ordinance itself also give rise to differences in the limitation periods for contract and tort. The basic period of limitation in both contract and tort is six years, except that in tort, if it is an action for personal injury damages, the period is three years. Despite the shorter period in an action for personal injury damages, an action in tort may offer the plaintiff more time in which to bring the action, whether it be a claim for property damage (including economic loss) or personal injury. This is so because the ordinance now provides for extensions of the limitation period in situations of latent injury or damage.

For instance, s 27 of the Limitation Ordinance provides that for damages in respect of personal injury caused by 'negligence, nuisance or breach of duty,' the limitation period is three years from the date on which the cause of action accrued, or the date (if later) of the plaintiff's 'knowledge' of the injury and its origins in tort (see s 27(6)). Depending on the circumstances of the case, this latter period may not commence for some years after the occurrence of the breach and/or damage, depending on the state of the plaintiff's knowledge as defined in the ordinance. In such a case the action in tort could survive an action in contract by many years.

Similarly, regarding latent property damage (including pure economic loss) s 31 provides that the limitation period for actions for negligence can also be enlarged. The period will be six years from the date on which the cause of action accrued, or three years from the date of knowledge (if that period expires later). It is to be noted that s 31 is apparently not available to similarly enlarge the limitation period in an action brought for breach of contract ('negligence' having been judicially defined to mean the tort of negligence⁸), so the concurrency issue becomes of paramount importance. And so, for example, where a negligent property valuation has been made, and the client does not learn of the inaccuracy until four years later, the limitation period in contract would expire six years from the date of the inaccurate valuation, while the limitation period in tort would not expire until three years after the client learned of the inaccuracy (date of knowledge), on these facts a full seven years after the negligent valuation.⁹

⁷ Exceptionally, with trespassory torts, which do not require the occurrence of damage for actionability, the tort is complete on the occurrence of the conduct that defines the tort, whether or not damage occurs.

⁸ *Iron Trade Mutual Insurance Co Ltd v J K Buckenhan Ltd* [1990] 1 All ER 808.

⁹ This example is based on the facts of *First National Bank v Humberts* [1995] Constr Law Jo 141.

The right to sue in tort in addition to contract may also be important to the plaintiff because the rules respecting remoteness of damage in contract and tort may lead to different recovery under each. In fact, the remoteness rules in tort are often more favourable than those in contract. *The Wagon Mound (No 1)*¹⁰ provides that all damages, however extensive (even if unforeseeably so) are recoverable so long as they are of a reasonably foreseeable type. The 'thin skull' rule would even allow recovery where the type of damage was not reasonably foreseeable, so long as some foreseeable harm was caused and the unforeseeable harm came about as a result of the plaintiff's susceptibility.¹¹ Mental distress damages are more likely to be recoverable in tort than in contract, despite inroads made in some contract cases. These remoteness rules seem to provide for a broader recovery of damages than the generally accepted rule in contract law that restricts recovery to those damages naturally arising, or within the reasonable contemplation of the parties.¹²

Other differences exist, although these do not always favour the tort action. Again on the subject of damages, in contract the plaintiff is entitled to damages for the lost bargain.¹³ That is, he is entitled to be put in the position he would have been in had the contract been performed. In tort, on the other hand, he is to be put in the position he would have been in had no tort been committed.¹⁴ In most cases in which concurrent liability is pleaded this will yield no difference, but in those rare cases where there is a difference, it is the contract measure that will normally yield a higher award. For example, in a negligent advice case, in tort the plaintiff would be awarded the amount lost in reliance on the negligent advice, whereas in contract he would be awarded any amounts lost on the transaction, as well as the profits that would have been made had the advice been carefully given.

Furthermore, the defence of contributory negligence is generally not available to the defendant in a breach of contract action.¹⁵ Its availability very much depends on whether the defendant's negligent breach of contract would also give rise to liability in tort independently of the existence of the contract (whether or not the plaintiff pleads the action in tort).¹⁶ This is a necessary exception for, were it otherwise, workers suing employers for negligently caused injuries would plead the case in breach of contract only, in order to avoid a plea of contributory negligence. Of course, this leads to the irony that in some cases it is the defendant who will insist on the principle of concurrent liability.

¹⁰ [1961] AC 388.

¹¹ *Smith v Leech Brain* [1961] 3 All ER 1159.

¹² *Hadley v Baxendale* (1854) 9 Exch 341; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528.

¹³ *Robinson v Harman* (1848) 1 Ex 850, 855.

¹⁴ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 29, 39.

¹⁵ *Barclays Bank plc v Fairclough Building Ltd* The Times, 11 May 1994.

¹⁶ *Extramoney Limited and Carrian Holdings Ltd v Chan, Lai, Pang & Co* (1994) HCA No 8437 of 1987, applying *Forsikringsaktieselskabet Vesta v Butcher* [1986] 2 All ER 488.

General considerations

In the vast majority of cases, the right to pursue remedies in both tort and contract will not be important to the plaintiff, as normally the choice of the cause of action will have little or no impact on the outcome of the litigation. However, in those cases where a ruling in tort as opposed to contract would make a difference to the outcome of the litigation, the ruling in tort will normally prove to be more favourable to the plaintiff (for the reasons given in the previous section). Nonetheless, received judicial wisdom has long asserted the primacy of contract over tort. That is, where the facts suggest the availability of a tort action in circumstances where the plaintiff was in privity with the defendant, and the court rules against the availability of concurrent remedies, the plaintiff is required to proceed in contract rather than tort.¹⁷ This privileging of contract over tort has never been adequately explained, and probably owes more to history than to logic or policy. The argument that, the parties having negotiated their positions under contract, they are then restricted to remedies under contract, does not convince. The general law imposes a duty in tort. Why should that duty not prevail?

It is to be noted that Hong Kong law, like English law, has long recognised the right of a plaintiff to pursue remedies in tort in certain categories of relationships, despite the existence of contract. For instance, remedies in tort are routinely recognised in actions by a patient against his doctor, a passenger against his carrier, a tenant against his innkeeper, and a worker against his employer, despite the existence of a contract remedy. These relationships have in common the obvious feature that the harm caused by the defendant's negligence is likely to be physical in nature. However, at least as regards property damage, the distinction with economic loss is much of the time a distinction without a difference, since most property damage is satisfactorily compensated (economically and emotionally) with a money award. Therefore, any argument in favour of allowing concurrent liability in only some cases and not others must look elsewhere for its justification. At any rate, it would be an unfortunate development in the law that professionals such as doctors and engineers (who routinely cause physical damage), as opposed to accountants and lawyers (who are more likely to cause a purely financial loss), would be treated less favourably merely because of the nature of the harm they are likely to cause.

Nonetheless, there can be no doubt that the judicial reluctance to recognise the principle of concurrent liability has been greatest when the harm suffered is pure economic loss. This may be because, historically, pure economic loss has been thought to be the sole province of contract law. In recent times, however,

¹⁷ *Groom v Crocker* [1939] 1 KB 194; *Bagot v Stevens Scanlon & Co Ltd* [1964] 3 All ER 577.

incursions have been made by tort law into the area of negligently inflicted economic loss, most notably in the decision of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.¹⁸ As a result of that case, any claim that contract alone governs the matter of pure economic loss is no longer tenable.

The argument against concurrency typically proceeds on the footing that the parties' expectations are based on contract alone, that the integrity of the contractual relations must be preserved, and that to allow an action in tort would be to undermine that integrity. It must be noted that this kind of argumentation simply does not convince in the cases of contracts in the so-called 'common callings',¹⁹ where the plaintiff's expectations are not based on anything in particular, least of all contract, and where the integrity of the contractual relations cannot be said to be compromised. Hence, in these categories, a concurrency rule has long been recognised. Such argumentation could have application, if at all, where tort liability is alleged in a purely commercial setting, in which the terms of the contract had been the subject of specific negotiation. But even here, one could ask, why is it that one who pays should be worse off than a volunteer? At any rate, in such cases, could the matter not be easily resolved by reference to the terms of the contract itself, to determine whether or not it was indeed intended by the parties that remedies should lie in contract only, rather than in a blanket rule restricting the remedy to contract? For instance, where there is an exclusion clause limiting liability according to the contract, the intention to exclude tort liability would be overriding.

Tai Hing Cotton Mill

Whatever may have been his intention, the question of concurrent liability in contract and tort was not settled by Lord Scarman in the oft-cited Hong Kong Privy Council decision of *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank*.²⁰ In this case, a customer sued its bank for alleged mismanagement of its account in accepting forged cheques submitted by the customer's fraudulent clerk. In its defence, the bank answered that the customer owed the bank a duty of care in regard to the careful exercise of its account. In rejecting the bank's argument, Lord Scarman said:

Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship ... their lordships believe it to be correct in principle and necessary for

¹⁸ [1964] AC 465.

¹⁹ Eg, carrier/passenger, innkeeper/tenant, bailor/bailee.

²⁰ Note 3 above.

the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, eg, in the limitation of action.

Far from avoiding confusion, this dictum gave rise to fresh controversy, largely because of the uncertainty of its meaning and effect. It did not seem to irrevocably commit the law to a 'contract only' position, if only because to do so would have had the effect of overruling a large body of case law in which, in certain categories of cases at least, the concurrency principle had long been recognised (as discussed above). Moreover, Lord Scarman did not address the seminal decision in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp*,²¹ in which Oliver J, after an impressive historical review of the case law, found in favour of a concurrency rule in a solicitor/client negligence action. Neither did Lord Scarman provide a firm theoretical justification for the contract only position, beyond the usual argument about contractual expectations.

Nonetheless, there soon developed a line of cases in which the *Tai Hing* decision was relied on to restrict the plaintiff to the contract remedy.²² Unfortunately, with only a few exceptions, little attention in those cases was paid to identifying and assessing the underlying policy considerations which might justify such a restriction. Therefore, there never developed a principle according to which it could be predicted whether or not a given case would be caught by the *Tai Hing* dictum. At any rate, there also developed a competing line of cases in which the *Tai Hing* position was conveniently disregarded,²³ leaving the law in an uncertain state.

The recent decisions in the House of Lords

In *Spring v Guardian Assurance*,²⁴ the plaintiff was a former employee of the defendant insurance company. The plaintiff's prospective employer requested a reference letter from the defendant, which was duly provided. The letter conveyed a negative impression of the plaintiff as an employee, and as a result he was not awarded the job with the prospective employer (a pure economic loss). The letter was found to be inaccurate in its contents, so the plaintiff sued

²¹ [1979] Ch 384.

²² See eg *National Bank of Greece SA v Pinios Shipping Co (No 1)* ('The Maira') [1989] 1 All ER 213; *Banque Financiere de la Cite SA v Westgate Insurance Co* [1989] 2 All ER 952; and *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* ('The Good Luck') [1989] 3 All ER 628.

²³ See eg *Forsikringsaktieselskapet Vesta v Butcher* (note 15 above); *Banque Kaiser Ullmann SA v Skandia(UK) Insurance Co Ltd* [1987] 2 All ER 923.

²⁴ [1994] 3 All ER 129.

the defendant in, inter alia, the tort of negligence. This action was eventually upheld by the House of Lords in a decision which rested on the case of *Hedley Byrne* for establishing tort liability, a sufficiently close proximity based on an 'assumption of responsibility' having been proved. Of interest for present purposes is the holding of Lords Goff, Slynn, and Woolf to the effect that liability also arose in contract, there being an implied term of the contract of employment that the defendant would take reasonable care in the preparation of any reference letters. Although the content of the duty was the same as that in tort, and therefore added nothing to the tortious duty, it was clearly the court's view that the tort duty applied 'concurrently with a contractual duty to the same effect.'²⁵ It is to be noted that this finding took place in a case that was not concerned with physical damage, nor was it a common calling case. It is also to be noted that the decision conceals another concurrency implication, for there can be no doubt that an action would also have been available in the tort of defamation.²⁶ Unfortunately, there was again little attempt to enter into the larger jurisprudential debate regarding justification of a concurrency rule.

In *White v Jones*²⁷ the plaintiffs were disappointed beneficiaries under a will. The defendant solicitors had delayed in the making of testamentary amendments requested by the testator. In the result, on the death of the testator, the plaintiffs were not named as beneficiaries, as requested by the testator. In a remarkably creative application of the *Hedley Byrne* principle, again placing special emphasis on the concept of 'assumption of responsibility,' the case of *Ross v Caunters*²⁸ was approved and a duty of care in tort was found to have been owed by the solicitors. In reaching its decision the court considered argument concerning the conceptual difficulty of extending the duty of care of solicitors to non-contracting parties. This conceptual difficulty was eventually overcome (see the decision for details) but, in the process, the court affirmed (obiter) the concurrent nature of the solicitor's duty to his client in tort and contract.²⁹ This was a necessary finding for, as suggested above, if a non-paying third party is owed a duty in tort, it would be unjust to withhold that duty from a fee-paying client. The court accepted the decision of Oliver J in *Midland Bank* as correct on this point. For Hong Kong this decision restored the position as regards solicitors taken as long ago as 1984 in the District Court decision in *Yu Man v T L Ip & Co.*³⁰

By far the most important case in this trilogy is that of *Henderson v Merrett Syndicates Ltd*,³¹ a case which addressed the *Tai Hing* position head on. The

²⁵ Ibid, p 147, per Lord Goff.

²⁶ Although such an action would surely have been defeated by the defence of qualified privilege.

²⁷ [1995] 1 All ER 691.

²⁸ [1979] AC 193.

²⁹ See Lord Goff at p 704.

³⁰ See note 4 above.

³¹ [1994] 3 All ER 506.

plaintiffs were Lloyd's names (underwriting members of Lloyd's) who had suffered extensive financial losses as a result of what they alleged was the negligent mismanagement of their portfolios by the defendants, their underwriting agents. In many (although not all) of the claims, the plaintiffs were in contractual relations with the defendants. As the claims in contract were in some cases statute-barred, those plaintiffs contended for a liability in tort, in addition to the action in contract, in order to obtain a longer limitation period under the English equivalent of s 31 of the Limitation Ordinance. Put simply, the plaintiffs argued that the relationship between the defendants and plaintiffs was of the *Hedley Byrne* variety, consisting of a special skill exercised by the defendant on the plaintiffs' behalf, in circumstances in which the plaintiffs had (to the knowledge of the defendants) reasonably relied on the exercise of that skill to their detriment. The defendants resisted this argument, not only on the basis that a *Hedley Byrne* relationship could not be made out, but (more to present purposes) that as the parties were in privity, there could be no action in tort. The defendants emphasised that in the *Hedley Byrne* case the parties were not in privity, and that therefore the *Hedley Byrne* principle should not be applied here. The defendants also relied on Lord Scarman's dicta in *Tai Hing* for support for their argument.

In a unanimous decision in which Lord Goff gave the main speech, the House of Lords allowed the plaintiffs' appeal. Lord Goff was satisfied that the decision of Oliver J in the *Midland Bank* case was a correct statement of the law. In that case, in which it had been held that a duty of care in tort was owed by a solicitor to his client, in addition to a duty in contract, Oliver J had demonstrated that the ruling in *Hedley Byrne* was not dependent on the non-contractual setting of that case. What was important was the close proximity of the parties, including an 'assumption of responsibility,' and the fact of the plaintiff's reasonable and foreseeable reliance on the defendant's services. The fact that the close proximity had arisen by virtue of a contractual arrangement should not have the effect of depriving the plaintiff of a remedy in tort.

Lord Goff found a duty of care in tort notwithstanding the absolute discretion to take risks conferred on the defendants in some of the contracts. And he was not concerned that a finding of duty of care in tort meant that the contractual limitation period in the legislation would be circumvented.

Lord Goff was careful not to allow the new concurrency principle to totally supplant a contract. His Lordship adopted the view of Le Dain J of the Supreme Court of Canada in *Central Trust Co v Rafuse*,³² to the effect that concurrent tort liability will be prevented if its effect would be to permit the plaintiff to escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Lord Goff put it somewhat more cautiously when

³² (1986) 31 DLR 481.

he said that there will be no tort liability where the 'tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.'³³

Lord Goff rejected the notion that the law of tort should be read as supplementary to the law of contract. The law of tort is the general law, albeit the parties may contract out of it.³⁴ In so saying he liberated the law of tort from the constraints that were imposed on it by Lord Scarman in *Tai Hing*.

Implications

It will be recalled that in *Tai Hing* Lord Scarman emphasised that it was particularly in commercial relations that the court should be loathe to find a tort duty when the parties were already in contract. Although *Henderson* is not strictly speaking about commercial relations, it is most certainly about commercial matters. Given the diversity of facts of the trilogy of House of Lords decisions under consideration, there now seems little to prevent concurrency in any kind of contractual arrangement, whether involving a risk of personal injury or property damage (areas in which the concurrency principle was well established already), or a risk of financial loss only. Everyone, not only the professional classes, is bound by the new concurrency rule. And this trilogy of decisions demonstrates that it is no objection that the necessary *Hedley Byrne* proximity for a pure economic loss tort duty arises by virtue of the contract and for no other reason. The fact of a contract does not in itself have the effect of restricting remedies. After all, the parties are no less neighbours where the coming together occurs as a result of a contract.

Neither, apparently, will the 'justice and reasonableness' doctrine be available to prevent concurrency, Lord Goff having pronounced in *Henderson* that once the *Hedley Byrne* proximity has been established, concepts of justice and reasonableness need not be considered.³⁵ This is a remarkable concession to say the least, as this device, by virtue of its open-endedness, had proved very useful to the courts in controlling the duty of care on a case-by-case basis, particularly in cases concerned with contractual frameworks.³⁶ Now, the door seems open to application of the concurrency principle in commercial arrangements formerly thought immune from actions in tort.

Lord Goff said that concurrent liability will not arise if the contract says as much, whether expressly or by necessary implication. What he did not do is

³³ Note 31 above, p 533.

³⁴ Ibid, p 532.

³⁵ Ibid, p 521. There is some uncertainty on this point, given that justice and reasonableness were considered by the court in *White v Jones* after having found a *Hedley Byrne* relationship.

³⁶ See eg *Pacific Associates Inc v Baxter* [1989] 2 All ER 159.

provide practical guidance as to what constitutes a sufficient indication from the contract that a tort duty is excluded. Of course, a carefully worded disclaimer excluding or limiting liability in tort will be sufficient, given Lord Goff's approval of the decision in *Central Trust Co v Rafuse*.³⁷ Whether Lord Goff also had in contemplation cases such as *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd*³⁸ is not as clear. In that case it was held that the action in tort must fail because, the parties having not included in the contract a term requiring reasonable care in the performance of the piling works (as opposed to the design of the works), there could be no wider duty in tort.³⁹ In commenting on *Tai Hing*, Lord Goff did say that the issue in that case was whether a tort duty more extensive than the contract duty could be established, and he seems to accept the negative answer reached in that case as correct.⁴⁰ However, given his assertion that tort law is the general law, not merely supplementary to the law of contract, it would seem that a tort duty could, in appropriate cases, be wider than the contract duty.⁴¹

The lack of guidance as to what constitutes 'inconsistency with the contract' may lead to some startling and possibly unintended results. On Lord Goff's formulation, the spectre is raised of dual liability in activities such as ordinary construction and development projects, contracts for the provision of services, and the manufacture or provision of goods. Heretofore, these areas were thought to be off limits to tort remedies.⁴² The extension of tort law into these areas would signal considerable implications for a wide range of players in the construction and service industries in Hong Kong, not to mention their insurers. In fact there now seems to be little to prevent tort's application in such contractual settings. Two parties entering into contractual relations involving a close interdependency qualifying as a 'Hedley Byrne relationship,' whether for construction or installation on a development site, or even for the provision of parts or materials, would now arguably be entitled to plead the case in tort, subject only to Lord Goff's undefined qualification that the tort duty be not inconsistent with the contract. The necessary proximity — straightforward neighbourhood criteria for physical damage cases, and, for pure economic loss, a relationship paraphrased in each of the three decisions under consideration as 'assumption of responsibility' — will now be a matter for separate consideration on a case-by-case basis. Any notion that shoddy construction work, or

³⁷ Note 32 above. However, it should be noted that any express contractual exclusion or limitation clause caught by the Control of Exemption Clauses Ordinance would have to pass the 'reasonableness' test set out therein.

³⁸ [1988] 2 All ER 971.

³⁹ Such reasoning could also account for the decision in *Tai Hing*.

⁴⁰ Note 31 above, p 526.

⁴¹ Indeed, this possibility has recently received confirmation in the Court of Appeal, in *Holt v Payne Skillington*, *The Times*, 22 December 1995, where it was stated obiter, and in reliance on *Henderson*, that the tort duty owed to property purchasers by their estate agents could be wider than the contract duty (estate agents' appeal allowed on other grounds).

⁴² See for instance Lord Bridge in *Murphy v Brentwood* [1990] 2 All ER 908, 927.

defective products, typically classified as pure economic loss, cannot be the subject of *Hedley Byrne* liability, would be inconsistent with Lord Goff's general pronouncements. Just as negligent statements came to include negligent acts and services, because there is little of substance to justify any distinction in the law's treatment, thereby extending the reach of the *Hedley Byrne* principle, so too can the provision of construction services, or of products (of any sort) be included under the *Hedley Byrne* rubric,⁴³ resulting in an even more dramatic transformation of the law than is immediately apparent from the facts of the three decisions under consideration.

Conclusion

In some respects this trilogy merely continues a trend discernible in certain recent decisions concerning the availability of contributory negligence in a breach of contract action,⁴⁴ aspiring as those decisions did to fairness for a defendant answering a claim brought in contract only by a contributorily negligent plaintiff. Those decisions permitted the defence on the premise that tort liability co-existed with the contract liability, the case therefore coming within the language of the apportionment legislation.⁴⁵ As well, this trilogy acknowledges a principle that was being routinely recognised and applied in decisions of the Hong Kong courts, at least in the context of physical damage cases, and those involving the so-called common callings.

On the other hand, despite expending considerable effort in reviewing the main authorities, Lord Goff, like so many of his predecessors, fails to provide a theoretical basis for moving to the position of concurrency and free choice of remedies. Having asserted that tort is the general law out of which rights and duties arise, and in this sense is not subservient to the law of contract, and having recognised the obvious injustice in a rule that places a paying plaintiff in a worse position than a volunteer, Lord Goff never really addresses the question why contracting parties should have their relations defined, one might say redefined, according to tort law principles. Moreover, the rule that he creates is unnecessarily open-ended, leaving rather little in the way of direction as to when the tort duty established by the plaintiff will be seen to be inconsistent with the contract.

Nonetheless, the decisions in these three factually diverse cases, taken together, evince a clear judicial preference for an overriding concurrent liability principle. The traditional policy argument supporting the primacy or exclusivity of the contract remedy by reference to notions such as commercial

⁴³ Arguably, this much was already established in *Junior Books v Veitchi* [1983] 1 AC 520.

⁴⁴ See note 16 above.

⁴⁵ In Hong Kong, see Law Amendment Reform Consolidation Ordinance, s 21.

integrity, and the need to preserve the parties' negotiated contractual positions, has been rejected. A plaintiff in privity will no longer face a bar in pursuing a tort remedy, if a tort relationship can be made out, even where the tort relationship arises by virtue of the contract. Even the justice and reasonableness component will not be available to prevent a tort duty from arising.⁴⁶ The end result in a given case may be 'untidy',⁴⁷ but the legal position now arrived at has the virtue of greater certainty and, arguably, justice. A plaintiff who pays will not be worse off than one who does not.

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⁴⁶ See note 35 above.

⁴⁷ In the words of Lord Goff in *Henderson v Merrett* (note 31 above), p 532.
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